

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-7251

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007
REF. #T-5983 DOCKET NO. 76-7251

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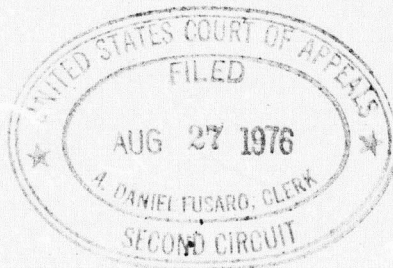
EUGENE S. RAPELYEA
PLAINTIFF-APPELLANT

v.

THE NEW YORK STATE SUPREME COURT,
THE NASSAU COUNTY BOARD OF SUPERVISORS
DEFENDANT-APPELLEES

BRIEF OF PLAINTIFF - APPELLANT

^T
APPENDIX



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STATEMENT OF JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. Sect. 1257 (2), in that the only issue presented in this appeal concerns the constitutionality of a State Statute under the Constitution of the United States. The specific statute involved is a local law adopted by the Legislative body of Nassau County, the Board of Supervisors, to amend the County Government Law of Nassau County and reapportion the voting system utilized by the Board of Supervisors. New York Law views such a local law as a "State Statute". F.T.B. Realty v. Goodman 300 N.Y. 14089 N.E. 2d 865; Olive Coat Co., Inc. v. City of New York, 283 N.Y. 733-28 N.E. 2d 965; Cohen & Karger, Powers of the New York Court of Appeals, 58, pp. 265-256.

OPINIONS BELOW

The Memorandum and Order 75-C-1696 of the United States District Court Eastern District of New York, March 31, 1976.

Franklin v. Mandeville 26 N.Y. 2d 65 Appendix _____

Franklin v. Krause 72 Misc. 2d 104 Appendix _____

QUESTIONS PRESENTED

1. Whether weighted voting is unconstitutional per se as a plan of permanent apportionment for a unicameral, County Legislative body having general governmental powers.

2. Whether a plan of apportionment for a County Legislative body having general governmental powers constitutionally may prevent the representatives of one local unit (Town of Hempstead) containing more than 57% of the County population from casting sufficient votes to pass legislative measures requiring a simple majority vote.

3. Whether a plan of apportionment for a County legislative body having general governmental powers constitutionally may create a modified weighted voting system that gives one local government unit (Town of Hempstead) 100% "Veto" power without providing a constitutional means for overriding such veto power.

4. Whether or not a modified weighted voting system that gives one local government unit (Town of Hempstead) veto power without providing for the means to override such veto does not completely cancel out the vote of the remaining Supervisors and their constituents and by so doing make a mockery of the "one man, one vote" concept and deny them equal protection of the Law under the 14th Amendment to the U.S. Constitution.

5. Whether a modified weighted voting system that gives a greater value to a vote when cast by residents of the cities of Long Beach and Glen Cove while "cancelling" out the vote of approximately 14,000 residents in the Town of Hempstead, 51,000 in the Town of North Hempstead and 39,000 in the Town of Oyster Bay in those instances where a simple majority is required is sufficient to constitute a denial of Equal Protection of the Law under the 14th Amendment to the U. S. Constitution.

6. Whether the modified weighted voting Law of Nassau County when used to promulgate tax assessment regulations, does in effect deny those persons whose vote is "cancelled out" of their property rights without substantive and procedural due process of law under the 14th Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

Plaintiff-Appellant, Eugene S. Rapelyea, a resident of Nassau County, commenced this action on October 9, 1975 against the New York Supreme Court and the Nassau County Board of Supervisors (the "Board"). Plaintiff-Appellant sought to enjoin the implementation of a districting plan to Nassau County, and the use of weighted voting in that County. Plaintiff-Appellant's objection to the plan was that it failed to create a district from the census tracts comprising a "cognizable racial element", and instead divided the tracts in question among several districts, and that this violated the Equal Protection Clause of the 14th Amendment. Plaintiff-Appellant further stated that weighted voting in any form was inconsistent with the principle of one man, one vote. Thereafter, Plaintiff-Appellant obtained a rider requiring defendants to show cause why the New York Supreme Court should not be required to draw up a plan which included his suggested district; why the election of candidates should not be enjoined until such plan was prepared; why the Single member district plan proposal should not be stricken from the ballot until modified to include the suggested district; and why the weighted voting plan should not be stricken. The Board moved to dismiss the action on a number of grounds. On October 16, 1975, the arguments of both sides were heard and the United States District Court reserved decision pending the outcome of the scheduled November election. In the

election of November 1975, the weighted voting plan was upheld by the voters. On April 2, 1975, United States District Court Judge Thomas C. Platt denied Plaintiff's motion and granted defendant's motion. Plaintiff-Appellant filed Notice of Appeal on April 26, 1976.

HISTORY OF REFERENDA

In 1970, the apportionment of Nassau County was held unconstitutional by the New York Court of Appeals, Franklin v. Mandeville, 26 N.Y. 2d 65 (1970). See Appendix p.____, and the Board was given six months from the public announcement of the results of the 1970 Census to draw up a new plan. After considerable delay, the Board adopted a new weighted voting plan which was ultimately approved by the Court of Appeals, Franklin v. Krause, 32 N.Y. 2d 234 (1973) app'l dismissed, 415 U.S. 904 (1974). This plan was presented to the voters but was defeated in a referendum vote in November 1974. Thereafter, the Board proposed the creation of a System of representation with 15 Single member districts to supersede the Board of Supervisors. Although the Courts approved this plan, the voters rejected it in June 1975. Mr. Justice Liff of the New York Supreme Court, Nassau County, then appointed a commission to promulgate a reapportionment plan. The Commission's 15 Single member district was ordered into effect by Mr. Justice Liff and was to continue "until validly superseded". Representatives were to be chosen in the November 1975 election. Thereafter, the Board adopted two possible superseding plans for submission to the voters in that same election:

- 1) The modified permanent weighted voting plan preserving the Board of Supervisors (the very same plan defeated by the voters the year before) and the "Liff Plan" as modified. The voters, then, were to pass on the modified weighted voting plan and the modified "Liff Plan", and to elect representatives for the 15 Single member districts of the original "Liff Plan".

The voters of Nassau County rejected the modified "Liff Plan" but approved the modified weighted voting plan, and so, in accord with Judge Liff's directive, the Original Liff Plan was validly superseded by the weighted voting System of the Nassau County Board of Supervisors.

THE WEIGHTED VOTING SYSTEM OF NASSAU COUNTY

BOARD OF SUPERVISORS WEIGHTED VOTING

<u>1970 Population</u>	<u>Votes</u>		<u>Percentages*</u>	
	<u>Present Plan</u>	<u>New Plan</u>	<u>Population</u>	<u>Vote Power New Plan</u>
Hempstead 830,000	62	70	56.3%	-55.6%
Oyster Bay 359,000	28	32	23.1	-20.4
No. Hempstead 235,000	21	23	16.5	-13.0
Long Beach 33,000	2	3	2.3	+ 5.5
Glen Cove 26,000	2	2	1.8	+ 5.5
*Percentages to nearest 10th		115 130	100.0%	100.0%

NOTES TO ABOVE WEIGHTED VOTING

<u>Population</u>	<u>Percent of Vote</u>
1,473,000	100% of vote
147,300	10% of vote
14,730	1% of vote
1,473	1/10 of 1% of vote

VARIATIONS IN VOTING POWER

- 7.3% on matters requiring "Simple Majority".
- 10.5% on matters requiring "Two-thirds Majority".

VETO POWER* POSSESSED BY TOWN OF HEMPSTEAD

*The Town of Hempstead, one unit of local government, retains absolute veto power on issues requiring a "Simple Majority" and on issues requiring a "Two-thirds Majority". There exists no provision in the weighted voting system of the Nassau County Board of Supervisors which provides for an "Override of the veto".

POINT #1

The Plaintiff-Appellant contends that weighted voting is unconstitutional per se as a plan of permanent apportionment for a unicameral, County Legislative body having general governmental powers. The United States Supreme Court stated in United States v. Bathgate 246 U.S. 220, pg. 227

"A predominant consideration in determining whether a state's legislative apportionment Scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection clause is that the rights allegedly impaired are individual and personal in nature."

An analysis of the percentages voting power variation from the population of each local government reveals that the Town of Hempstead was decreased by seven-tenths of one percent or 10,331; Oyster Bay was decreased by 2.7 percent or approximately 39,771 votes, the Town of North Hempstead was decreased by 3.5 percent or 52,565 votes. When these numbers are totalled together, one gets a figure of 102,667 individual United States Citizens who under the above mentioned principle of law who have had their "personal and individual rights" impaired under the 14th Amendment Clause of the U.S. Constitution. In other words, everytime "a Simple Majority" vote is achieved, approximately seven percent of the Nassau County voters must have their vote "cancelled out".

The above resolution is viewed by New York State Law as a "State Statute". F.T.B. Realty v. Goodman 300 N.Y. 140, 89 N.E. 2d 865; Olive Coat Co., Inc. v. City of New York, 283 N.Y. 733, 28 N.E. 2d 1965; Cohen & Karger, Powers of the New Court of Appeals 58 pp. 265-256. What we really have then is New York State violating the constitutional rights of one hundred and two thousand six hundred and sixty-seven (102,667)

United States Citizens everytime a "Simple Majority" vote is achieved and this is done approximately one thousand times per year. Where a "Two-thirds Majority" is required, the percentage is increased to 10.5 percent or Two Hundred and Twenty Thousand Nine Hundred and Fifty (220,950) United States Citizens having their Constitutional rights violated by the State of New York. The Supreme Court of the United States has long since said that no State can pass a law that violates the Constitutional rights of its Citizens, *Colegrove v. Green* (328 U.S. 549). The Plaintiff-Appellant states without equivocation that if the votes of Nassau County's weighted voting plan that have been cancelled out are "personal and individual" as stated in *U.S. v. Bathgate* 246 U.S. 220 pg. 227, then they cannot be taken away from the individuals they belong to without due process of law. If it is essential to weighted voting that some individual rights must be diminished, which is clearly unconstitutional, then there is no mathematical possibility for the occasion to arise where it will ever be supportive of the "one man, one vote" principle handed down by the United States Supreme Court in *Gray v. Sanders* 372 U.S. 368. Again if "the right to vote is personal" *Reynolds v. Sims* (377 U.S. 533) then weighted voting is per se unconstitutional.

POINT #2

No plan of apportionment for a County Legislature having general governmental powers constitutionally may prevent the representatives of one local unit (Town of Hempstead) containing more than 57% of the County population from casting sufficient votes to pass legislative measures requiring a "Simple Majority" vote.

Again in Gray v. Sanders 372 U.S. 368 pp. 379-380

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote-whatever their race, whatever their sex, whatever their occupation, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the 14th Amendment."

The Plaintiff-Appellant respectfully submits that this passage is saying that all of the voters in the Town of Hempstead must have under the Constitution of the United States, their votes count equally and alike when they vote for the Presiding Supervisor and the Supervisor. After the votes are cast, the representatives of the Town of Hempstead cannot proceed to the County Board of Supervisors and participate in any unconstitutional process that would "Cancel out" 10,311 votes of its constituents and thus violate their Federally protected rights as U.S. Citizens, Colegrove v. Green.

It may be stated here that when a voter in the Town of Hempstead and the other units of local government in Nassau County cast their votes in local elections these representatives comprise the Nassau County Board of Supervisors. By passing the resolution that established the permanent weighted voting plan of Nassau County, the Board simultaneously violated the Federally Protected rights of approximately 102,667 voters; 10,331 in Hempstead; 39,771 in the Town of Oyster Bay and 52,565 in the Town of North Hempstead. All in violation of what the U.S. Supreme Court specifically held in Gray v. Sanders as quoted above to be the law of the Constitution of the United States. Simply stated every voter in the Towns of Hempstead, North Hempstead and Oyster Bay cannot be said to have an equal vote when the above number of voters also residing in these geographical locations have no vote at all.

POINT #3 & #4

The Nassau County Board of Supervisors Local Law #13-1972 when passed carried with it an inherent defect so great that it must be declared unconstitutional on its face. The present law gives the Town of Hempstead "100% Veto Power". If the Town of Hempstead refuses to cast its vote, no legislation can be passed by "Simple Majority" or "Two-thirds Majority". The effect of this power brings the entire legislative process to a screeching halt where it must remain until the Town of Hempstead alone decides otherwise. The ultimate effect of this power is that the democratic process of making a bill a law is stopped completely. And when that happens another form of government takes its place. Incidentally, from this vantage point, weighted voting in Nassau County is about as far away from the "One man, one vote" concept as it can get.

In other words, if the weighted voting plan requires something more than what Hempstead has to pass a law then it should have created another device to override the "veto power" of the Town of Hempstead. Failing to do this enables the Town of Hempstead to "Take its ball, bat and gloves and go home", leaving the rest of the Supervisors without the means to play the game.

The Plaintiff-Appellant is not aware of any State government under the Constitution of the United States that permits its Governors who usually sign bills into law to veto a bill without providing for an "override" of that veto power by a two-thirds majority of both houses of a bi-cameral legislature. This device is known as our System of Checks and Balances designed specifically to prevent one branch of government from going too far. It doesn't exist in this law. As a result, the Town of Hempstead has the

"veto power" to destroy the whole Board of Supervisors. An incident of "cancelling out" of constitutional rights of U.S. Citizens too grotesque to imagine.

POINT #5

The Plaintiff-Appellant here contends that the modified weighted voting System which gives a greater value to a vote when cast by residents of the Cities of Long Beach and Glen Cove while "cancelling out" the vote of approximately 14,000 residents in the Town of Hempstead, 51,000 in the Town of North Hempstead, and 39,000 in the Town of Oyster Bay in those instances where a "Simple Majority" is required, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

In Reynolds v. Sims (377 U.S. 533) the United States Supreme Court specifically held:

- (1) "The right of Suffrage is denied by debasement or dilution of a citizen's vote in a state or Federal election".

The Court goes on further to say:

- (2) "The Equal Protection Clause requires substantially equal legislative representation for all citizens in a state regardless of where they reside".

pp. 561-568

The Court also says that:

"And it is inconceivable that a State Law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable."

It must be repeated here that New York State Law views the weighted voting resolution passed by the Nassau County Board of Supervisors (#13-1972) as a "State Statute" *F.T.B. Realty v. Goodman* (300 N.Y. 140) 89 N.E. 2d 865; *Olive Coat Co., Inc. v. City of New York*, 283 N.Y. 733, 28 N.E. 2d 965; *Cohen v. Karger*, Powers of the New York Court of Appeals, 58, pp. 265-256. Therefore, the holding of the United States Supreme Court in *Reynolds v. Sims* (377 U.S. 533) is in point and directly applicable to the case here presented.

In the above contentions, the Plaintiff-Appellant sought to establish that approximately 102,667 votes were taken away from the Towns of Hempstead, Oyster Bay and North Hempstead. These votes went somewhere. It is respectfully submitted that these votes were distributed among the Cities of Long Beach and Glen Cove. The City of Glen Cove received approximately 54,501 votes raising the value of its population from 26,000 to 80,501 or a 5.5% of the total population of Nassau County. This is a vote power that is over three times what the population of Glen Cove originally had.

The City of Long Beach received approximately 47,136 votes raising the value of its population from 33,000 to 80,136 or 5.5% of the total County population. This vote power is over twice what the City of Long Beach had to begin with.

What we have here then is; if a Nassau County voter chose to reside and vote in Glen Cove, his vote would be worth three times as much; if he chose to reside and vote in Long Beach, his vote would be worth twice as much; if he chose to reside and vote in the Town of Hempstead; his vote would be approximately 1% less in value; North Hempstead 3% less in value and in Oyster Bay 2.7% less in value. This is just on

resolutions that require a "Simple Majority" or 71 votes for passage. On "Two-thirds Majority" resolutions the variations go as high as 10.5 percent or 220,950 votes are re-distributed. Let us be reminded that each vote represents one Citizen of the United States whose Federally protected rights under our Constitution that have been violated by the weighted voting law of the Nassau County Board of Supervisors which is considered a "State Statute" in New York State.

Precisely what Reynolds v. Sims held as "inconceivable" the Nassau County Board of Supervisors proudly refers to as Resolution #13-1972, the Modified Weighted Voting Law. This ludicrous resolution must be declared unconstitutional.

POINT #6

Resolution #13-1972, the Modified Weighted Voting Law of the Nassau County Board of Supervisors when used to promulgate tax assessment laws does in effect deny those persons whose vote is "cancelled out" of their property rights without due process of law under the 14th Amendment.

The Court in Reynolds v. Sims (377 U.S. 533) specifically held that "the right of Suffrage is denied by debasement or dilution of a Citizen's vote in a State or Federal election".

To the Plaintiff-Appellant this principle of Constitutional Law clearly points that if the votes of approximately 102,000 Citizens are in fact "cancelled out" when the "Board" votes on a "Simple Majority" issue and more so on a "Two-thirds Majority" matter, then when the "Board" deals with tax assessment levies, the Citizens "cancelled out" have no representation on the "Board". Not only have their 14th Amendment rights been violated, but their 15th Amendment rights as well. This re-occurs every time the "Board" votes.

When Resolution #13-1972 is analyzed closely and when it is realized that each vote that has been "cancelled out" under the modified weighted voting Law of Nassau County, is a personal, inalienable right being taken from a Citizen of the United States whose rights are protected by the Federal Government, the magnitude of the unconstitutionality of Resolution #13-1972 begins to appear. Further when we find as here that it also detrimentally effects our tax structure by the Citizens not having proper representation, then we begin to realize this is what made us break away from England over Two Hundred years ago. It is at this point that Resolution #13-1972 is tampering with the very basic metaphysical presupposition of a Democracy "a representative form of government". It's frightening. No computer system in the world is ever going to lull the Plaintiff into a "rut of complacency" about his constitutional rights and those of his neighbors. No! Negative! Never ever!

SUMMARY

Havoc is being wrought on the constitutional rights of over 200,000 Citizens of the United States that happen to reside in Nassau County, New York. Resolution #13-1972 is the instrument through which this nefarious deed is being accomplished for the reasons given above.

Weighted voting per se is unconstitutional as it applies through Resolution #13-1972. This is true because the very "nature of the beast" requires that someone other than the person who has the right must decide what value to place upon it. This raises the immediate question "by what authority?" do they make this decision. No authority exists under the Constitution of the United States for Resolution #13-1972.

The United States Supreme Court so stated in Gray v. Sanders (372 U.S. 368) pp. 380-381. Here the Court gives the only exceptions to the rule that exists in the Constitution.

"The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the Electoral College in the choice of a President. Yet when Senators are chosen, the "17th" states the choice must be made "by the people". Minors, felons, and other classes may be excluded.

1. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."

The Plaintiff-Appellant feels that the unconstitutionality of Resolution #13-1972 could not be stated more clearly and, therefore, prays that the Court grant the following relief:

- (1) That the case be remanded to the New York State Supreme Court, Nassau County.
- (2) That a special election be held utilizing the "Liff" Plan modified to include the census tracts that comprise a "cognizable racial element".
- (3) And such other relief that the Court sees fit to give.

Respectfully submitted,

EUGENE S. RAPELYEA
PRO SE

A P P E N D I X

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LEWIS ORGEL
CLERK

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
EASTERN DISTRICT OF NEW YORK
U. S. COURT HOUSE
BROOKLYN, NEW YORK 11201

April 2, 1976

Mr. Eugene S. Rapelyea
35 Elizabeth Avenue
Hempstead, New York 11550

75-C-1696
RE: RAPELYEA vs. NY STATE SUPREME COURT,
NASSAU CO. BD. OF SUPERVISORS

Dear Sir:

I enclose a copy of the memorandum and order of
HON. Thomas C. Platt U.S.D.J.
filed herein on April 2, 1976
in the above entitled matter.

Very truly yours,

Lewis Orgel
Clerk of Court

By: Thomas B. Costello
Thomas B. Costello
Chief Deputy Clerk

Encl.

cc- Atty. Gen., State of NY
Att: Barbara Resnicoff, Esq.
cc- George C. Pratt, Esq.

Filed P:48
4-2-76

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

EUGENE S. RAPELYEA,

Plaintiff,

-against-

NEW YORK STATE SUPREME COURT,
NASSAU COUNTY BOARD OF SUPERVISORS,

Defendants.

75 C 1696

MEMORANDUM AND
ORDER

March 31, 1976

-----x

PLATT, D.J.

Appellant

Plaintiff, Eugene S. Rapelyea, a resident of Nassau County, commenced this action on October 9, 1975 against the New York Supreme Court and the Nassau County Board of Supervisors (the "Board"). Plaintiff sought to enjoin the implementation of a districting plan for Nassau County, and the use of weighted voting in that County. Plaintiff's objection to the plan was that it failed to create a district from the census tracts comprising a "cognizable racial element," and instead divided the tracts in question among several districts, and that this violated the Equal Protection Clause of the Fourteenth Amendment. He further stated that weighted voting in any form was inconsistent with the principle of one man, one vote. Thereafter, plaintiff obtained an order requiring defendants to show cause why the New York Supreme Court should not be required to draw up a plan which

included his suggested district; why the election of candidates should not be enjoined until such plan was prepared; why the single member district plan proposal should not be stricken from the ballot until modified to include the suggested district; and why the weighted voting plan proposal should not be stricken. The Board moved to dismiss the action on a number of grounds. On October 16, 1975, the arguments of both sides were heard and this Court reserved decision pending the outcome of the scheduled November election.

A brief history of the referenda presented for approval in the November election is necessary for an understanding of the issues raised in this case.

In 1970, the apportionment of Nassau County was held unconstitutional by the New York Court of Appeals, Franklin v. Mandeville, 26 N.Y.2d 65 (1970), and the Board was given six months from the public announcement of the results of the 1970 census to draw up a new plan. Though not in a timely fashion, the Board adopted a new weighted voting plan which was ultimately approved by the Court of Appeals. Franklin v. Krause, 32 N.Y.2d 234 (1973), app'l dismissed, 415 U.S. 904 (1974). This plan was presented to the voters but was defeated in a referendum vote in November 1974. Thereafter, the Board proposed the creation of a system of representation with 15 single member districts to supersede the Board of Supervisors. Although the courts approved this

plan, the voters rejected it in June 1975. Mr. Justice Liff of the New York Supreme Court, Nassau County, then appointed a commission to promulgate a reapportionment plan. The commission's 15 district plan was ordered into effect by Mr. Justice Liff and was to continue "until validly superseded." Representatives were to be chosen in the November 1975 election. Thereafter, the Board adopted two possible superseding plans for submission to the voters in that same election:

- 1) the modified weighted voting plan preserving the Board of Supervisors (the same plan defeated the year before) and
- 2) the "Liff Plan" as modified. The voters, then, were to pass on the modified weighted voting plan and the modified "Liff Plan", and to elect representatives for the 15 districts of the original "Liff Plan."

The voters of Nassau County rejected the modified "Liff Plan" but approved the modified weighted voting plan, and so, in accord with Judge Liff's directive, the original "Liff Plan" was validly superseded by the weighted voting system of the Board of Supervisors.

The defendant, New York Supreme Court, demanded judgment in its favor on a variety of grounds. Since plaintiff's challenge to the districting of the Liff Plan is now moot, that plan having been superseded, the portions of the complaint directed at the Supreme Court must be dismissed. The other contentions raised by this defendant need not be discussed.

However, since weighted voting was approved by the electorate, plaintiff's constitutional attack on it and the Board's motion for dismissal must be considered. No questions of fact remain, and thus the Court can decide these motions pursuant to Rule 12(c) of the Federal Rules of Civil Procedure or, since affidavits have been submitted by both sides, dispose of this case under Rule 56 as if a motion for summary judgment had been made.

The weighted voting system as it now stands in Nassau County provides that 130 votes are to be distributed among six supervisors. Two supervisors are elected at-large from the Town of Hempstead and each casts 35 votes. The Oyster Bay Supervisor casts 32; the North Hempstead Supervisor, 23; the Long Beach Supervisor, 3; and the Glen Cove Supervisor, 2. A simple majority requires 71 votes and a two-thirds majority requires 92 votes. Thus, while the Town of Hempstead contains 56% of the population, the votes of its two Supervisors do not constitute a majority. /

The position taken by plaintiff is that such a system is in derogation of the principle of one man, one vote. The Board responds that this point has already been decided by the New York Court of Appeals in Franklin v. Krause, supra, and is res judicata. Moreover, it contends that the weighted voting system of Nassau County actually implements the one man, one vote principle.

The doctrine of res judicata has been stated by the Supreme Court in Commissioner v. Sunnen, 333 U.S. 591, 597 (1948):

"The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."

This doctrine is inapposite to the situation at bar. While a court of competent jurisdiction has entered a final judgment on the merits, the parties or their privies in the present action are not the same as those in the first. Due process mandates that all parties have a day in court and prohibits the binding of a party by a determination which he had no ability to affect.

It is true that relatively recent decisions have called into question the mutuality doctrine, holding that where a party has had a full and fair opportunity to litigate a particular question he cannot demand a second one, e.g. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Goldstein v. Doft, 236 F.Supp. 730 (S.D.N.Y. 1964), aff'd, 353 F.2d 484 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141 (1967). But every party can demand the first opportunity.

Although plaintiff appears to have interests similar to those of plaintiffs in Franklin v. Krause, supra, he is not in privity with them and cannot be said to have had an opportunity to litigate his position. While we recognize that the essential nature of a challenge such as the one in this case to an election law is that of a class suit, without class action designation, persons appearing to fall within the "class" cannot be bound by the first judgment and are not foreclosed from relitigating the same questions of fact and law. N.Y. Civil Practice Law & Rules § 905 (McKinney Supp. 1975); cf. Fed. R. Civ. P. 23(c)(3).

The issue remains, then, whether the weighted voting system of Nassau County is repugnant to the principle of one man, one vote and in violation of the Equal Protection Clause of the Fourteenth Amendment. For reasons that follow, we hold that the particular system before us is constitutionally permissible and that we therefore must dismiss the remainder of plaintiff's complaint.

The United States Supreme Court has never directly passed on the constitutionality of a weighted voting plan such as the one before us. But of course a weighted voting plan must conform to the mandate of "one person, one vote," Gray v. Sanders, 372 U.S. 368, 381 (1963); cf. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

A three-judge Court convened in this District reviewed a plan that called for straight weighted voting of the Board of Supervisors of Suffolk County as it was then constituted. Blanchi v. Board of Supervisors of Suffolk County, N.Y., 268 F.Supp. 1021 (E.D.N.Y. 1966). That Court ruled the plan constitutionally defective. The decision was based in part upon a decision by the New York Court of Appeals approving weighted voting as a temporary measure until a permanent plan establishing one man, one vote could be drafted and submitted for voter approval. Graham v. Board of Supervisor Erie County, N.Y., 49 Misc. 2d 459 (Sup.Ct. Erie Co.), modified, 25 A.D.2d 250 (4th Dep't), modified, 18 N.Y.2d 672 (1966). See also, Town of Carmel v. Board of Supervisors of Putnam County, N.Y., 27 N.Y.2d 975 (1970). The Blanchi Court, however, did not rule that weighted voting itself was unconstitutional. Moreover, Blanchi was prior to Franklin v. Krause, supra, which substantially changed the view in New York that weighted voting was permissible only if temporary. It is clear to this Court that weighted voting cannot be declared constitutional or unconstitutional by viewing the concept in a vacuum. The factors of a particular case may make weighted voting appropriate or constitutionally impermissible. Judge Weinstein has suggested that:

"It seems likely that weighted voting will be held to comply with federal constitutional requirements when it is 1) adopted in good faith, 2) to meet special situations, and 3) discrepancies in voting power are not extreme." Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 COLUM. L. REV. 21, 41 (1965).

The New York Court of Appeals reviewed this Nassau County weighted voting system and upheld it, stressing the special circumstances of the County:

"The problem here is somewhat unique. In none of the literature . . . or the cases thus far, has the situation arisen where, as here, one of the units of local government, in a county seeking to employ weighted voting, alone includes a majority of the county's total population. It is argued that for this reason the principle of weighted voting is impossible of application because in order precisely to satisfy the principle of one man, one vote the largest unit's voting power ought to be commensurate with the size of its population, but that to achieve that would be to violate the Iannucci ban on 100% voting power.

". . . [But] [i]t has been argued to us, without material opposition, that the small board, composed of the unit Supervisors, is the most efficient form of government, and has proved to be such over the years. . . . Thus, to preserve unit boundary lines and the concomitant efficiency in the rendition of local services, without creating a monstrous legislative body, virtually necessitates a weighted voting system which can approach as closely as possible the one man, one vote principles discussed in Iannucci." Franklin v. Krause, supra, at 238-39.

Further, strict adherence to the one man, one vote principle does not appear to be required at the local level. Abate v. Mundt, 403 U.S. 182 (1971) (11.9% deviation held permissible for county legislature); see also Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 733-34 (1973), and Associated Enterprises, Inc. v. Totlec Dist., 410 U.S. 743 (1973) (disproportionate voting power in special purpose units of government held permissible). The voting power

deviation in Nassau County through the use of the weighted voting system would be no more than 7.3%.

Finally, there seems to be no question but that the weighted voting plan here was adopted in good faith and the voters of the County have stamped the same with their approval.

For the foregoing reasons this Court is in full agreement with the New York Court of Appeals that this system suffers from no constitutional infirmity and cannot be declared unconstitutional.

Plaintiff's motion is hereby denied and defendant's motion is hereby granted.

SO ORDERED.

Thomas C. Platt
U.S.D.J.

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Statement of Case

LAWRENCE FRANKLIN et al., Respondents, v. STANLEY W. KRAUSE, as Clerk of the Board of Supervisors of the County of Nassau, et al., Defendants, and FRANCIS T. PURCELL et al., Constituting the Board of Supervisors of the County of Nassau, Appellants.

Argued February 15, 1973; decided May 3, 1973.

Constitutional law—apportionment of Board of Supervisors—weighted voting by Supervisors of Nassau County is constitutional—voting power might deviate from population by 7.3% at most—even though largest town has 56% of county's population and Supervisors of that town have 70 votes out of total of 130 votes, no measure can be passed without at least 71 votes.

Some 56% of the population of Nassau County resides in the Town of Hempstead. The county's legislature consists of six Supervisors: two from the big town, one from each of the other two towns, and one each from the county's two cities. Of the county's total population, the two cities contain 1.8% and 2.3% respectively, and the other two towns contain 16.5% and some 23% respectively. Among the six Supervisors some 2,000 possible combinations of voting power were reviewed by a computer analyst. Thereupon the six Supervisors unanimously adopted, by local law, the following constitutionally valid system of weighted voting by the Supervisors. One city's Supervisor has 2 votes, the other city's Supervisor has 3 votes, one town's Supervisor has 23 votes, another town's Supervisor has 32 votes, and the big town's two Supervisors have 35 votes each (that is, those two together have 70 votes out of the total of 130 votes); but, for measures requiring a majority (which would be 66 votes) 71 votes are required; and for measures requiring a two-thirds vote (which would be 87) 92 votes are required. Thus, the two big town Supervisors can defeat any proposed measure if the two of them vote the same way, all the other Supervisors together have only 60 votes; but, on the other even when the two big town Supervisors vote the same way, they cannot have a majority to enact a measure without the favorable vote of at least one other Supervisor. Furthermore, considering the ratio between the 130 votes and the respective populations, the computer analyst finds that voting power could deviate from population by 7.3% at most. For the purposes of a local legislative body, this plan practically meets the one man-one vote requirement.

Franklin v. Krause, 72 Misc 2d 104, reversed.

APPEAL, on constitutional grounds, from a judgment of the Supreme Court at Special Term (MARIO J. PITTONI, J.), entered in Nassau County, which (1) denied plaintiffs' application for appointment of a nonpartisan commission to prepare and submit a plan of apportionment and voting for the Nassau County Board of Supervisors, (2) denied defendants' application for approval of Local Law No. 13-1972, and (3) adjudged that Local

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Law No. 13-1972 is unconstitutional in that it violates the equal protection clauses of the State and Federal Constitutions.

George C. Pratt for appellants. I. Whether tested by this court's decision in *Iannucci v. Board of Supervisors* (20 N Y 2d 244) or by the U. S. Supreme Court's decisions in *Abate v. Mundt* (403 U. S. 182) and *Whitcomb v. Chavis* (403 U. S. 124), Local Law No. 13 of 1972 is constitutional. (*Baker v. Carr*, 369 U. S. 186; *Wesberry v. Sanders*, 376 U. S. 1; *Reynolds v. Sims*, 377 U. S. 533; *Avery v. Midland County*, 390 U. S. 474; *Abate v. Mundt*, 25 N Y 2d 309, 403 U. S. 182; *Whitcomb v. Chavis*, 403 U. S. 124; *Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244; *Gordon v. Lance*, 403 U. S. 1.) II. Weighted voting is not per se unconstitutional. (*Graham v. Board of Supervisors of Erie County*, 18 N Y 2d 672; *Town of Carmel v. Board of Supervisors of Putnam County*, 27 N Y 2d 975.)

John M. Armentano, Stanley Harwood and A. Thomas Levin for respondents. I. The proposed "new" plan fails to meet the standard enunciated by the Court of Appeals in this very case. A majority of the population is deprived of a majority of the vote on the board. (*Abate v. Mundt*, 25 N Y 2d 309, 403 U. S. 182; *Town of Carmel v. Board of Supervisors of Putnam County*, 27 N Y 2d 975.) II. Assuming, *arguendo*, that the proposed "new" plan is valid within the standards set forth in this court's prior decision, it fails to apportion "voting power" as required by the Court of Appeals. (*Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244; *Matter of Town of Smithtown v. Howell*, 31 N Y 2d 365.) III. Weighted voting is unconstitutional per se. (*Reynolds v. Sims*, 377 U. S. 533; *Piesco v. di Francesca*, 72 Misc 2d 128; *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 382 U. S. 4; *Shilbury v. Board of Supervisors of County of Sullivan*, 46 Misc 2d 837, 25 A D 2d 688; *Graham v. Board of Supervisors of Erie County*, 18 N Y 2d 672; *Lucas v. Colorado Gen. Assembly*, 377 U. S. 713; *Town of Carmel v. Board of Supervisors of Putnam County*, 27 N Y 2d 975.)

GABRIELLI, J. Special Term has declared unconstitutional a weighted voting plan adopted by the Board of Supervisors of

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Nassau County; and we are presented with the question whether the board has overcome the infirmity of a prior plan it had proposed.

In *Franklin v. Mandeville* (26 N Y 2d 65) this court rejected the weighted voting plan under which the Board of Supervisors (board) had operated for well over 30 years primarily for the reason that Supervisors representing some 57% of the county's population located in the Town of Hempstead could cast but 49.6% of the board's vote. It was further determined that, within six months from the public announcement of the results of the 1970 census, the board was to promulgate an acceptable plan. Ultimately, after delays beyond the six-month limit not here pertinent, plaintiffs, residents, taxpayers and qualified voters of Nassau County, moved at Special Term for an order appointing a nonpartisan commission to prepare a plan then to be implemented by the court. In September, 1972, the board, composed of four Republicans and two Democrats, unanimously adopted Local Law No. 18-1972, which provided a new weighted voting system. The board cross-moved for approval of this plan.

Special Term ruled that the plan contained the same fault for which it was previously rejected; that it did not otherwise meet criteria set down by this court in other cases; and that weighted voting was per se unacceptable as a matter of law. Special Term refused to appoint a nonpartisan commission and gave the board 60 days to devise an acceptable plan. Under the rationale of this decision, of course, the plan would either have to be based on the multi-member or single-member district concept. The board appeals directly here under CPLR 5601 (subd. [b], par. 2).

The new plan emerged after a computer analyst reviewed over 2,000 different combinations of votes and voting—this, in an effort to conform to this court's pronouncements on weighted voting made in *Iannucci v. Board of Supervisors of County of Washington* (20 N Y 2d 244) where, *inter alia*, it was held that "voting power" could only be equalized properly through computer mathematical analysis. One hundred possibilities were given the board's attorney and of these he submitted "a half dozen or so" for the board's consideration. The plan selected provides for a total of 130 votes to be distributed among the

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six Supervisors, as follows: Each of the two Supervisors elected at large from the Town of Hempstead, 35; the Oyster Bay Supervisor, 32; the North Hempstead Supervisor, 23; the Long Beach Supervisor, 3; and the Glen Cove Supervisor, 2. Since the Town of Hempstead contains some 56% of the county's population, and its two Supervisors possess combined voting power corresponding to 55% there is minimal deviation off the ideal, of but -1.6. Oyster Bay with some 23% of the population has 20.370% voting power through its Supervisor, a deviation of -2.7. North Hempstead 16.5% population, 13% voting power, -3.5 deviation. Long Beach 2.3% population, 5.6% voting power, +3.3 deviation. Glen Cove 1.8% population, 5.6% voting power, +3.8 deviation.

Thus, the smaller communities are superenfranchised to a somewhat greater extent than the larger communities are disenfranchised. But the range of deviation is only 7.3% and the plan fits comfortably within the intendment of *Iannucci v. Board of Supervisors of County of Washington* (20 N Y 2d 244, *supra*) as affected by subsequent case law. The problem in *Iannucci* was that the smaller units of local government were not accorded decisive voting power under those weighted voting plans which would approximate the power they would project through their representatives in a legislative body which did not employ weighted voting. With regard to the plan here under consideration, and in light of the voting power combinations worked out by the computer analyst, the superenfranchisement of the smaller units in this case satisfies *Iannucci* in this respect.

It was also noted in *Iannucci* that a weighted voting plan would be invalid if over 50% of the population were represented by a legislator entitled to cast over 50% of the votes for then, in reality, he would possess 100% voting power, at least as to measures requiring a majority vote for passage. The instant plan would violate that injunction, of course, were it not for its provision that for passage of a measure requiring a majority 71 and not 66 votes are required; and for measures requiring a two-thirds vote, 92, and not 87, votes are required. Thus, while the Town of Hempstead Supervisors together possess 70 votes, more than a majority of the total 130, they cannot have 55% voting power which would ordinarily be 100% voting power in a "pure majority" situation. This admittedly artificial

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1 voting requirement, in reality, gives the Town of Hempstead
7 a greater disenfranchisement than would otherwise be the case
5 in certain voting combinations.

This is precisely the point which caused our rejection of the former plan, which, although based on different scales and values, contained the same sort of bar preventing the Town of Hempstead Supervisors from having 100% voting power. At the time that decision was handed down, the preachment was that one man, one vote had to be applied at all levels of government with mathematical certitude and this court was concerned with the scope of Hempstead's disenfranchisement. In the intervening years this stricture has been considerably softened with respect to local level government and this reshaping is most desirable, as demonstrated in the case at bar.

The problem here is somewhat unique. In none of the literature (see Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 Albany, L. Rev. 1 [1969]; Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rutgers L. Rev. 317 [1965]), or the cases thus far, has the situation arisen where, as here, one of the units of local government, in a county seeking to employ weighted voting, alone includes a majority of the county's total population. It is argued that for this reason the principle of weighted voting is impossible of application because in order precisely to satisfy the principle of one man, one vote the largest unit's voting power ought to be commensurate with the size of its population, but that to achieve that would be to violate the *Iannucci* ban on 100% voting power.

We would be extremely reluctant to reject this weighted voting plan, approved unanimously by a bipartisan board, and force the county into multi-member districting. It has been argued to us, without material opposition, that the small board, composed of the unit Supervisors, is the most efficient form of government, and has proved to be such over the years. It is also pointed out, again without serious question, that multi-member districting would necessitate a very large legislative body (estimated at 55 members), because of the central problem—the huge disparity between the size of the population in the Town of Hempstead, and the other units which even among themselves are grossly disproportional in population size. Thus,

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to preserve unit boundary lines and the concomitant efficiency in the rendition of local services, without creating a monstrous legislative body, virtually necessitates a weighted voting system which can approach *as closely as possible* the one man, one vote principles discussed in *Iannucci*.

We now know that if complete mathematical perfection is not achieved at the local level there need be no reason to discard an apportionment plan solely for that reason. It has now become clear that a fair measure of superenfranchisement and disenfranchisement can be tolerated for the sake of the preservation of local units.

In *Abate v. Mundt* (25 N Y 2d 309) this court approved a multi-member districting plan over the argument of excessive deviation. Judge BURKE noted that the one man, one vote principle is treated differently at the three levels of legislative apportionment, i.e., at the congressional, State and local levels; that different considerations obtain at the local level and that "variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines" (25 N Y 2d, at p. 316, quoting from *Swann v. Adams*, 385 U. S. 440, 444, emphasis added by Judge BURKE). *Abate* was affirmed in the Supreme Court where it was stated that slightly greater percentage deviations could be tolerated for local apportionment schemes. "Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality" (403 U. S. 182, 185). In a companion case, *Whitcomb v. Chavis* (403 U. S. 124), involving the reapportionment of Marion County, Indiana, as a multi-member district for the election of State representatives and senators, the court declared multi-member districts not to be inherently unconstitutional and approved the plan over objection that it discriminated against concentrations of Negro voters. The *Abate* scheme held a 12% variation, and Justice HARLAN, in a concurring opinion, remarked upon the court's declining enthusiasm for the application of strict standards to local situations.

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In *Mahan v. Howell* (— U. S. — [42 U. S. L. W. 4277, Feb. 21, 1973]) the plan involved apportionment of the State of Virginia for the election of State delegates and senators. Basic to the plan was the preservation of political subdivision boundary lines and this resulted in a "maximum percentage variation from [the] ideal" of 16.4%. Justice REHNQUIST specifically approved the idea that more "flexibility" was constitutionally permissible with respect to State legislative reapportionment than in congressional redistricting, stating: "Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting . . . broader latitude has been afforded the States . . . The dichotomy between the two lines of cases has consistently been maintained. In *Kirpatrick v. Preisler* [394 U. S. 526], for example, one asserted justification for population variances was that they were necessarily a result of the State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing political subdivision boundaries. This argument was rejected in the congressional context. But in *Abate v. Mundt* 403 U. S. 182 (1971), an apportionment for a county legislature having a maximum deviation from equality of 11.9% was upheld in the face of an equal protection challenge, in part because New York had a long history of maintaining the integrity of existing local government units within the county." (41 U. S. L. W., at p. 4279)¹.

Finally, in *Matter of Schneider v. Rockefeller* (31 N Y 2d 420) this court approved the new State legislative plan, Judge JASEN's opinion including dictum especially pertinent in the case now before us. Petitioners argued in *Schneider* that *Abate v. Mundt* (25 N Y 2d 309, affd. 403 U. S. 182, *supra*) had softened the

1. In two very recent cases it was held that special-purpose units of government such as water and sewage districts could operate outside strict one man, one vote principles because they affected "definable groups of constituents more than other constituents", and that certain groups could thus have disproportionate voting power (*Salger Land Co. v. Tulare Lake Basin Water Stor. Dist.*, — U. S. — [41 U. S. L. W. 4390, 4396, March 20, 1973]; *Associated Enterprises v. Totter Watershed Improvement Dist.*, — U. S. — [41 U. S. L. W. 4397, March 20, 1973]). These decisions do not specifically extend to units of general local government apportionment such as we find in the instant case. There may be, however, further indication in these cases that the Supreme Court does not demand strict one man, one vote principles at the local level.

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principles of *Reynolds v. Sims* (377 U. S. 533), the landmark case on State legislative reapportionment, but the court found *Abate v. Mundt* applicable only to units of local government, stating: "While we would agree that *Abate* perhaps signals a reappraisal by the court of apportionment standards for local government, we think that the authorities amply support the choice of maximum population equality as a guiding principle in redistricting and reapportioning the State Legislature" (31 N Y 2d, at p. 428). Footnote 3 to the *Schneider* opinion states: "3. There may be good reason for treating local government apportionment as a distinct problem. As the court noted in *Abate*, local legislative bodies have fewer members and local legislative districts have fewer voters than their State and national counterparts. Thus, it may be more difficult to devise apportionment plans that comply with numerical equality at the local level. Furthermore, there are over 80,000 units of local government serving various functions. A certain flexibility may, therefore, be desirable to facilitate intergovernmental co-operation at this level. (See, e.g., *Avery v. Midland County*, 390 U. S. 474, 485.)"

That footnote distills the more recent thinking that the one man, one vote ideal, while not to be abandoned at the local level, can at least be tempered to meet local exigencies and preserve boundary lines. The plan before us comports with the standards set forth in *Iannucci v. Board of Supervisors of County of Washington* (20 N Y 2d 244, *supra*) as closely as is possible, given the unique situation created by Hempstead's size with the disparities in population among the other units. The fact that the plan still carries the problem found decisive in *Franklin v. Mandeville* (26 N Y 2d 65, *supra*) should not constitute a continuing bar to validation. It has been demonstrated that the standards applied to our former decision have been very significantly altered. The more thought that was given to the local situations, the more it became apparent it was more desirable to preserve traditional unit representation even if that led to a slight degree of disparity in voting power. The integration of local taxing and local services depends on preservation of unit boundary lines and unit representation. To merge these units into one another for the sake of creating mathematically equal districts would be to sacrifice practicality for an abstrac-

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tion; a situation which surely was never contemplated or briefed in *Reynolds v. Sims* (377 U. S. 533, *supra*). Representation at the State and congressional levels can be arranged on a more precise mathematical basis because the responsibilities of the representatives are not so specifically tied to the management of local affairs.

The plan before us has been "computerized" as suggested by the *Iannucci* requirement and moves close to one man, one vote without granting Hempstead 100% voting power. The total deviation is 7.3%, a tolerable figure within the contemplation of *Abate* and other recent cases (e.g., 16.4% in the *Mahan* case, — U. S. —, *supra*, and that at the State level). The Hempstead Supervisors' voting power is such that, assuming they wish to pass a measure requiring a majority, they need only one other Supervisor's vote. It would seem that together they can defeat any such measure without further aid since the rest of the Supervisors together do not have 71 votes among them. Thus, the citizens of Hempstead certainly have a weighty voice in this legislative process, while at the same time, the citizens of the other units cannot always be overwhelmed by that power. In other words, the citizens of the smaller units have decisive power in a significant share of the possible voting combinations.

In no way are we suggesting that the one man, one vote principle be abandoned at the local level. We will continue to insist that this ideal be the goal and that *Iannucci* be the guide. We merely conclude that the plan before us meets a sufficient standard when measured against the law as it now is with regard to local government. This law has assumed a desirable practicality because it allows for flexibility — something which, at least prior to *Abate v. Mundt* (25 N Y 2d 309, *affd.* 403 U. S. 182, *supra*) was lacking.

We hold there is no constitutional infirmity in the plan adopted by Local Law No. 13-1972.

The judgment should be reversed, without costs, and appellants' cross motion should be granted.

Chief Judge FULD and Judges BURKE, BREITEL, JASEN and JONES concur; Judge WACHTLER taking no part.

Judgment reversed, etc.

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LAWRENCE FRANKLIN et al., Plaintiffs, v. STANLEY W. KRAUSE, as Clerk of the Board of Supervisors of the County of Nassau, et al., Defendants.

Supreme Court, Trial Term, Nassau County, November 16, 1972.

Constitutional law—apportionment of Board of Supervisors—weighted voting plan for Nassau County Board of Supervisors disapproved as unconstitutional.

A proposed weighted voting plan for the apportionment of the Board of Supervisors of Nassau County (Local Laws, 1972, No. 13 of Nassau County) is disapproved by Trial Term as unconstitutional and as failing to meet the directions of the Court of Appeals (28 N Y 2d 65).

Stanley Harwood and John F. Armentano for plaintiffs. Joseph Jaspan, County Attorney, for defendants. George C. Pratt, special counsel for Board of Supervisors, defendant.

MARIO PITRONI, J. Plaintiffs sued defendant board in 1968 for a judgment declaring defendant board to be illegally apportioned, and the State Supreme Court, the Appellate Division of the Supreme Court, and the Court of Appeals all held the apportionment of defendant board unconstitutional (*Franklin v. Mandeville*, 57 Misc 2d 1072, affd. 32 A D 2d 549, mod. 26 N Y 2d 65 [Jan. 14, 1970], mot. to clarify and/or modify den. 28 N Y 2d 983 [May 26, 1971]). The Court of Appeals also ordered defendant board to adopt a valid plan "within six months after public announcement of the enumeration of the inhabitants of Nassau County in the Federal census of 1970" (p. 70).

The litigants dispute the starting date of that six-month period commanded by the Court of Appeals. However, no matter whose starting date we adopt, defendant board did not adopt a plan within six months commanded by the Court of Appeals. Following the Court of Appeals decision, defendant board did not introduce its new plan until August 14, 1972, nor adopt it until September 25, 1972. Therefore, plaintiffs say, not having acted within the specified time, defendant board has forfeited the right to adopt a plan of its own and the court should appoint a non-partisan commission to prepare a plan of apportionment.

Plaintiffs also say that the plan adopted by defendant board on September 25, 1972, is only a warmed over version of the one previously held unconstitutional by the Court of Appeals and is, therefore, also unconstitutional. Plaintiffs fortify their position by saying that "weighted voting" as in this case is another violation of that cliched "one man-one vote" rule developed by the United States Supreme Court within the last decade. The previous plan found unconstitutional by the Court of

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Appeals had been in effect since 1939. It provided for weighted voting whereby the Supervisors of the three towns and the two cities should have a number of votes equal to one vote for each 10,000 inhabitants which they represent. Fractional votes were not to be counted. For calculation purposes, each Hempstead Supervisor was deemed to represent one half of the town's population. There was one proviso, however, namely, that the Supervisor or Supervisors of no town or city could cast more than 50% of the votes. This was the system found unconstitutional in *Franklin v. Mandeville* (*supra*).

The Court of Appeals in *Franklin v. Mandeville* (26 N Y 2d 65, 69, *supra*) stated as follows: "The provision has survived two attempts at reapportionment, proposals therefor having been defeated in referendums conducted in 1965 and 1967; and clearly violates the one man, one vote principle. The phenomenal population growth in Hempstead, as in Nassau County generally, points up the inequality created and perpetuated by the charter provision. Not only are the Hempstead Supervisors presently barred from exercise of a majority vote, but section 104 would continue to deprive them, or the residents of any other town or city subsequently containing a majority of the county population, from majority representation, regardless of how great their majority may presently be or may in future become. This is the vital factor which distinguishes the case from *Abate v. Mundt* (25 N Y 2d 309), recently decided."

The new plan adopted September 25, 1972, is embodied in Local Law No. 13-1972. It continues a structure of town and city Supervisors sitting as board members, the mandatory decennial reallocation of votes, and use of a weighted voting system. It also continues the prohibition against fractional votes and against a Supervisor splitting his vote.

In fixing the standards for allocating votes, the new law provides that the "voting power" of a Supervisor shall be measured "by the mathematical possibility of his casting a decisive vote on a particular matter." It then equates a town's or city's "voting power" with that of its Supervisor, or, in the case of Hempstead, with the total voting power of its two Supervisors.

Furthermore, the percentages of voting power "shall approximate" the corresponding percentages of population and it further guarantees that no town or city shall be wholly without voting power.

Finally, in establishing its general standards for the system, the new plan requires that in preparing each reapportionment of votes defendant board shall employ "an independent com-

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puterized mathematical analysis " and any other methods which shall " most nearly analyze " the percentages of voting power and population.

Paragraph 5 of the new law turns from general standards to specific allocation of votes based upon the 1970 census data. In arriving at these numbers, defendant board followed the standards of paragraph 4 and worked with the aid of " an independent computerized analysis." The total number of votes allocated was 130, divided as follows:

Hempstead	35
Hempstead	35
Oyster Bay	32
North Hempstead	23
Long Beach	3
Glen Cove	2

The number of votes required for passage of a measure requiring a " majority " vote was fixed at 71 and for a " two-thirds " measure at 92. With these mathematical bases the computer then calculates the number of decisive votes each Supervisor may cast, then the respective percentages of voting power and, finally, for comparison purposes, the corresponding percentage of population.

Summarized in the " majority " plan, the relevant percentages and resulting deviations are as follows:

	Percentages of population	Percentages of voting power	Deviation
Hempstead (total)	56.2	54.6	-1.6
Oyster Bay	23.1	20.4	-2.7
North Hempstead	16.5	13.0	-3.5
Long Beach	2.3	5.6	+3.3
Glen Cove	1.8	5.6	+3.8

For the " two-thirds " vote, the figures are as follows:

	Percentages of population	Percentages of voting power	Deviation
Hempstead (total)	56.2	50.0	-6.2
Oyster Bay	23.1	20.8	-2.3
North Hempstead	16.5	20.8	+4.3
Long Beach	2.3	4.2	+1.9
Glen Cove	1.8	4.2	+2.4

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This, then, is the new plan that defendant board says follows the standards set in *Iannucci v. Board of Supervisors of County of Washington* (20 N Y 2d 244). This is the plan now under attack as unconstitutional.

Clearly this plan is a strained attempt to keep the old unconstitutional apportionment, tailored here and there to fit the court-mandated minimal requirements. But defendant board still fails to meet the requirements. The new September 25, 1972, plan, by giving Hempstead 70 votes and requiring 71 votes for a majority, allows Hempstead about 54% of the votes but requires about 54.6% of the votes to carry. This requires at least another vote from another municipality on defendant board to carry, even though Hempstead has 56.27% of the total county population. In short, under the plan now adopted, the Hempstead Supervisors are still barred from exercising a majority vote (*Franklin v. Mandeville*, 26 N Y 2d 65, 69, *supra*).

Furthermore, adopting the "voting power" concept it cannot be said that it is "mathematically possible for every member of the legislative body to cast the decisive vote on legislation in the same ratio which the population of a constituency bears to the total population"; nor can it be said that his voting power approximates "the power he would have in a legislative body which did not employ weighted voting" (*Iannucci v. Board of Supervisors of County of Washington*, *supra*, p. 252).

Also, the City of Glen Cove is given voting power greater than three times its share of its population, and voting power equal to the City of Long Beach, which has one-third greater population than the City of Glen Cove. Also, these two small cities, smaller than many villages in Nassau County, have greater voting power than they are entitled, to the detriment of the voting powers of the three towns.

Hempstead, whose population is 56.27% of the county, is deprived of 11.14% of the power to which it is entitled. Oyster Bay is deprived of over 11% of the power to which it is entitled, and North Hempstead is given 26.5% more power than it should receive because of its population.

The redistribution of voting power is even more lopsided when a two-thirds majority is required. The newly adopted plan requires 92 votes out of 130, whereas two thirds of the vote should require only 87 votes.

County Executive Ralph Caso stated the difficulty with the present plan in his veto message when he said:

"In effect, the proposed law would retain the present Board of Supervisors without material change. At the time of the

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Franklin decision, the population of the Town of Hempstead constituted 57.12% of the county population but Hempstead's two representatives on the Board of Supervisors constituted but 49.6% of the Board's vote.

"Under the proposed plan, the Hempstead supervisors would be allocated 70 votes out of a total of 130 to reflect their post-1970 census population of 55.6%, and yet, by another provision of the plan, they would again be denied the majority control. This provision redefines 'majority' to mean 71 votes out of 130, rather than the 66 votes which constitutes a mathematical majority. Similarly 'two-thirds' vote is defined as 90 votes rather than 86.

"The proponents of the local law urge that the amendments now contain a constitutionally valid plan of reapportionment when considered in terms of 'voting power' as determined by a computer.

"While weighted voting is not illegal *per se*, the mathematical gyrations necessary to preserve some effective voting power for the smaller political units represented on the Board require the destruction of principles of majoritarian democracy. And, while this principle is not inviolate in those circumstances where a practical and rational basis exists for deviation, it cannot be ignored in the face of viable alternatives.

"To say that a majority is not a majority for the mere sake of preserving one of many available forms of reapportionment is an unnecessary debasement of the rights of the voters."

Moreover, the present weighted voting system is attacked as invalid. Both sides have quoted and paraphrased from various high court decisions to draw inferences in their favor. Neither side has offered any United States Supreme Court or New York Court of Appeals decision that affirmatively and definitively supports either position under our Constitutions. Both sides stress cautious language uttered by the New York Court of Appeals in *Seaman v. Fedourich* (16 N Y 2d 94), *Graham v. Board of Supervisors of Erie County* (18 N Y 2d 672), *Iannucci v. Board of Supervisors of County of Washington* (20 N Y 2d 244, *supra*), *Town of Carmel v. Board of Supervisors of Putnam County* (27 N Y 2d 975).

One thing the Court of Appeals has decided: that weighted voting is acceptable "solely as a temporary [interim] expedient" (*Graham v. Board of Supervisors of Erie County, supra*, p. 674; *Town of Carmel v. Board of Supervisors of Putnam County, supra*). In both cases, there was a strong emphasis that this was solely a temporary interim expedient. Thus, although

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the New York Court of Appeals did not affirmatively say that the weighted voting system is invalid, that conclusion is clear from its strong language.

Defendant board has divided 54½ votes evenly between two Hempstead Supervisors and the other votes very unevenly among the other four Supervisors. This prevents these legislators from individually and substantially having the same influence as the others. Clearly, one or two Supervisors with heavy weighted votes or voting power could always stifle the votes or the influences of all the others. This would be particularly true not only in actual voting but in committees, caucuses, influences with other departments of government and other activities included in proper representations of and obligations to constituents.

Mr. Justice CARDAMONE, now a member of the Appellate Division, Fourth Department, clearly stated the defect of weighted voting in *Morris v. Board of Supervisors of Herkimer County* (50 Misc 2d 929, 931-933):

"The question simply posed is whether the imposition of weighted voting as a method of reapportionment is a constitutionally acceptable plan.

"The conception of political equality now expressed in the words 'one person, one vote' (*Gray v. Sanders*, 372 U. S. 363, 381 [1963]) guarantees that legislative seats, including those below the level of the State Legislature (*Seaman v. Fedourich*, 16 N Y 2d 94 [1965]) be apportioned on the basis of population (*Reynolds v. Sims*, 377 U. S. 533, 568 [1964]). Implicit in these actions, generally instituted by citizen voters, is that the use of the word 'votes' refers to the votes of each individual citizen and not to the votes cast by elected legislators (Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rut. L. Rev. 317, 321 [Winter, 1965]). It is not the equality of the votes cast at the legislative level, the remedy offered by weighted voting, that meets the test of 'one man, one vote' but 'substantial equality of population' which is required (*Reynolds v. Sims*, *supra*, p. 559).

"Most courts confronted with weighted voting plans and having to make some determination with respect to it have approved it only as an 'interim', 'temporary', or 'stopgap' measure until an acceptable permanent plan has been adopted (*Shilbury v. Board of Supervisors of County of Sullivan*, 46 Misc 2d 837 [Sup. Ct., Sullivan County, 1965], *affd.* 25 A D 2d 628 [3d Dept., 1966]; *Seaman v. Fedourich*, 47 Misc 2d 26 [Sup. Ct., Broome County, 1965]; *Treiber v. Lanigan*, 48 Misc 2d 434

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[Sup. Ct., Oneida County, 1966], mod. 25 A D 2d 202 [4th Dept., 1966]; *Graham v. Board of Supervisors of Erie County*, 49 Misc 2d 459 [Sup. Ct., Erie County, 1966]; *Dona v. Board of Supervisors of County of St. Lawrence*, 48 Misc 2d 876 [Sup. Ct., St. Lawrence County, 1966]). A number of other State courts have rejected weighted voting (*Brown v. State Election Bd.*, 369 P. 2d 140 [1962, Okla.]; *Cargo v. Campbell*, No. 33273, U. S. Dist. Ct., Santa Fe County, N. M., 1964; *Jackman v. Bodine*, 43 N. J. 491), and doubt has been cast upon its validity in a Federal Court (*WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 [U. S. Dist. Ct., S. D. N. Y. 1965]).

"Weighted voting is not constitutionally acceptable as a permanent plan of reapportionment. In almost all cases, weighted voting does not do the one thing which everyone assumes that it does, i.e., it does not allocate voting power equally to legislators in proportion to the population that each represents, because voting power is not proportional to the number of votes a legislator may cast. . . .

"Serious human and practical problems exist in a system of weighted voting which limit its usefulness on a permanent basis. Under Plan 'B' before the court, one of the two legislators from Little Falls casts 45 votes as measured against a legislator from the Town of Ohio who casts 5 votes. The question arises as to whether a legislator from Little Falls is permitted to make 9 times as many speeches, 9 times as many telephone calls and have 9 times as much patronage? When they serve on a committee together, does one legislator have 9 times as much power on that committee? If the weighted system is not followed on committee assignments then the disproportion which reapportionment seeks to correct is only partially corrected. If it is, meaningful representation by those who cast a small number of votes is lost. Weighted voting may also diminish the power of the most powerful personality in the group in cases where he has relatively small vote. A deliberative, democratic body should require the application of the concept of 'one man, one vote' within the body itself so that a rational debate amongst the representatives may take place. All of the personal attributes and characteristics of the elected legislator, his diligence, intelligence, ability, practicality, interest and knowledge concerning pending legislation should not be frustrated by the weight of a colleague who may be able to cast 8, 10 or 12 times his vote on any given issue. (Weinstein, *The Effects of the Federal Reapportionment Decision on Counties*

and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 46 (1965).)

"Finally, the Court of Appeals has now clearly held that weighted voting may be approved 'solely as a temporary expedient'; but that a permanent plan must be 'based on the principle of one man, one vote'. (*Graham v. Board of Supervisors of Erie County*, 17 N.Y.2d 866.)"

A telling blow was struck at weighted voting right here in Nassau County in December, 1966, when the Commission of Governmental Revision of Nassau County, a nonpartisan body appointed by two County Executives, made its report to the Board of Supervisors. It stated (p. 9): "weighted voting is not the equivalent of one-man-one-vote equal representation; it stifles the deliberative nature of the decision-making processes; it limits the effectiveness of the interchange of persuasive debate; it places undue emphasis upon the individual supervisors . . . related not to the quality of their ideas but to the weight of their vote. We believe that the deliberative, legislative and decision-making processes of the Board of Supervisors require that the relationship of its members towards one another be that of equals".

Thus, from the standpoint of ordinary votes, from the standpoint of voting power and from the standpoint of weighted voting, the plan adopted September 25, 1972, by defendant board does not comply with the requirements set by the New York Court of Appeals.

The attorney for defendant board points out, and properly so, that the thinking of the United States Supreme Court is becoming more crystallized against any further changes in the area of apportionment. I recognize that. I also recognize the fact that there will be a tremendous change in the New York Court of Appeals starting January 1, 1973. However, I must analyze and render my decision on the basis of the binding law already written by the higher courts. It is not within my province to decide this case in anticipation of how I think the new courts will decide it nor on what I think the law should be.

All parties have given me learned dissertations to persuade or dissuade me as to appointing a nonpartisan commission to prepare a valid plan of apportionment. I could hold that defendant board, not having adopted a valid plan within the limit set by the New York Court of Appeals, has forfeited the right to present another plan at this late date. I recognize, against this, that the court should not interfere with a legislative function unless the legislative body refuses or fails to

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act within a reasonable time. Thus, again, I could hold that defendant board has not done so and again that the board has forfeited the right to present another plan. However, defendant board consists of honorable men who are zealous in their attempt to do justice for the people of Nassau County. Defendant board stated in its September 25, 1972, resolution as follows: "WHEREAS, should the Court disagree with the Board's view as to validity of the plan hereinafter proposed, it is the intention of this Board then to propose within sixty days after the Court's determination becomes final a new alternative plan of representation based upon a system not utilizing weighted voting".

I am satisfied that defendant board will adopt such a new plan as mentioned above within the 60 days after the order to be entered herein.

Defendant board's application for approval of the reapportionment plan incorporated in Local Law No. 13-1972 and adopted by defendant board on September 25, 1972, is denied. As shown above, it is unconstitutional.

Plaintiffs' application for an order appointing a nonpartisan commission to prepare and submit to the court a plan of apportionment and voting for the Nassau County Board of Supervisors is denied. I am satisfied defendant board will adhere to its pledge of September 25, 1972, to propose a new plan "based upon a system not utilizing weighted voting" within 60 days of my final determination.

All other applications not specifically mentioned are denied.

For the benefit of all parties concerned and especially for the people of Nassau County, defendant board is directed to perfect an appeal, if so advised, with reasonable haste.

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Statement of Case

LAWRENCE FRANKLIN et al., Respondents, v. ELBERT MANDEVILLE,
as Clerk of the Board of Supervisors of the County of Nassau,
et al., Appellants, and Michael N. Petito et al., Respondents.

Argued December 4, 1969; decided January 14, 1970.

Constitutional law—apportionment of Board of Supervisors—weighted voting—county charter provisions under which Board of Supervisors of Nassau County operates, stating that no supervisors of any town or city shall be entitled to cast more than fifty per centum of total vote of board, violate "one man, one vote" principle—reapportionment properly directed—however, present plan should remain in effect as temporary measure until Federal census of 1970 is available.

1. Pursuant to the present weighted voting plan under which the Board of Supervisors of Nassau County operates, the Town of Hempstead's representatives may cast but 49.6% of the board's vote, although concededly, the town's population constituted 57.12% of the county's population. The county charter provides: "nor shall the supervisor or supervisors of any town or city be entitled to cast more than fifty per centum of the total vote of said board." (L. 1936, ch. 879, § 104, subd. 2.) This provision violates the "one man, one vote" principle. Not only are the Hempstead Supervisors barred from the exercise of a majority vote, but the charter provision would continue to deprive them, or the residents of any other town or city subsequently containing a majority of the county population, from majority representation, regardless of how great their majority may presently be or may in future become. It was proper to direct reapportionment.

2. It seems unwise and unnecessary to proceed to reapportion on the basis of the 1960 census. A valid reapportionment plan should be adopted by the Board of Supervisors within six months after public announcement of the enumeration of the inhabitants of Nassau County in the Federal census of 1970 and meanwhile the present plan should remain in effect as a temporary measure.

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APPEAL, on alleged constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 21, 1969, which unanimously

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affirmed a judgment of the Supreme Court at Special Term (WILLIAM R. GEILER, J.; opinion 57 Misc 2d 1072), entered in Nassau County, (1) granting motions for summary judgment striking out the answer of certain of the defendants, (2) adjudging that section 104 of the Nassau County Government Law (L. 1936, ch. 879, as amd.) is unconstitutional, and (3) directing defendants, constituting the Board of Supervisors of the County of Nassau, and its president, to adopt local laws containing valid plans for apportionment of the Nassau County Board of Supervisors.

George C. Pratt and Harold E. Collins for appellants. I. The courts below erred in holding the Nassau County system of modified weighted voting unconstitutional based solely on a comparison of populations with one town's percentage of the total vote of the Board of Supervisors. The constitutionality of an operating system of local government cannot be determined by reference solely to sterile, theoretical, mathematics; other factors reflecting the flexibility, diversity and experimentation which is necessary and desirable at the local government level must be considered. (*Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244; *Seaman v. Fedourich*, 16 N Y 2d 94; *Baker v. Carr*, 369 U. S. 186; *Wesberry v. Sanders*, 376 U. S. 1; *Reynolds v. Sims*, 377 U. S. 533; *Avery v. Midland County*, 390 U. S. 474; *Sailors v. Board of Educ. of County of Kent*, 387 U. S. 105; *Dusch v. Davis*, 387 U. S. 112.) II. Even assuming that mathematics is the "sole criterion" of constitutional validity for weighted voting plans, the courts below applied the wrong system of mathematics. (*Augostini v. Lasky*, 46 Misc 2d 1058; *Shilbury v. Board of Supervisors*, 46 Misc 2d 837; *Grove v. Chemung County Bd. of Supervisors*, 50 Misc 2d 418.) III. Special Term erred in determining this case on a motion for summary judgment. A trial is required to determine the "voting power" of the Nassau Supervisors. IV. If factors other than mathematics may enter into a determination of constitutionality, a trial is required. V. Should the court reverse and order a trial in this action, the burden of proof should rest upon the plaintiffs. VI. The courts below erred, even on their own premises, in granting judgment to four of the five plaintiffs and to the cross-claiming defendants.

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Seymour H. Kligler and Michael L. Goldstein for plaintiff-respondents. I. Weighted voting is illegal, per se. (*Graham v. Board of Supervisors of Erie County*, 18 N Y 2d 672; *Morris v. Board of Supervisors of Herkimer County*, 50 Misc 2d 929; *WMCA v. Lomenzo*, 238 F. Supp. 916, 382 U. S. 4; *Bannister v. Davis*, 263 F. Supp. 202; *Abate v. Mundt*, 59 Misc 2d 809, 33 A D 2d 660.) II. The section 104 plan as applied to Hempstead's Supervisors is invalid. (*Reynolds v. Sims*, 377 U. S. 533; *Avery v. Midland County*, 390 U. S. 474; *Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244; *Ambro v. Board of Supervisors of Suffolk County*, 55 Misc. 2d 1019; *Seaman v. Fedourich*, 16 N Y 2d 94; *Kirkpatrick v. Preisler*, 394 U. S. 526; *Wells v. Rockefeller*, 394 U. S. 542.) III. The section 104 plan as applied to other supervisors is invalid. (*Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244.) IV. The section 104 plan as applied to all supervisors is invalid. (*Town of Greenburgh v. Board of Supervisors of Westchester County*, 30 A D 2d 708; *Dobish v. State of New York*, 54 Misc 2d 367.) V. Summary judgment was proper. (*Gray v. Sanders*, 372 U. S. 368.) VI. Section 153, (subd. 4), of the County Law is unconstitutional.

Morris H. Schneider, County Attorney (*A. Thomas Levin* and *John M. Armentano* of counsel), for defendants-respondents. I. The constitutional mandate of "one person, one vote" applies to local legislative bodies. (*Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244; *Seaman v. Fedourich*, 16 N Y 2d 94; *Avery v. Midland County*, 390 U. S. 474; *Ambro v. Board of Supervisors of Suffolk County*, 55 Misc 2d 1019.) II. The apportionment of the Nassau County Board of Supervisors violates the constitutional mandate of "one person, one vote." Weighted voting is unconstitutional per se. (*Reynolds v. Sims*, 377 U. S. 533; *Seaman v. Fedourich*, 16 N Y 2d 94; *WMCA v. Lomenzo*, 238 F. Supp. 916, 382 U. S. 4; *Bannister v. Davis*, 263 F. Supp. 202; *Abate v. Mundt*, 59 Misc 2d 809, 33 A D 2d 660; *Morris v. Board of Supervisors of Herkimer County*, 50 Misc 2d 929; *Shilbury v. Board of Supervisors of Sullivan County*, 46 Misc 2d 837, 25 A D 2d 683; *Lucas v. Forty-Fourth Gen. Assembly of Col.*, 377 U. S. 713; *Iannucci v. Board of Supervisors of County of Washington*, 20

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N Y 2d 244.) III. Weighted voting as presently employed in Nassau County is constitutionally defective. IV. If Hempstead must be allowed more than half the votes of the board, section 104 (subd. 2) of the charter must be declared invalid. Where one portion of a statutory provision is invalid, other integrally related parts must fall with it. (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48.) V. If Hempstead is allocated votes on a strict population basis, thereby receiving 72 total votes, the resulting system of apportionment and voting is also constitutionally defective. VI. The apportionment provisions of the County Law, which would govern the representation on the board in the absence of charter provision, are invalid as applied to Nassau County. VII. This court should speak on the question of per se unconstitutionality of weighted voting. (*Graham v. Board of Supervisors of Erie County*, 18 N Y 2d 672; *Abate v. Mundt*, 59 Misc 2d 809, 33 A D 2d 660; *Dobish v. State of New York*, 54 Misc 2d 367.)

Louis J. Lefkowitz, Attorney-General (Daniel M. Cohen and Samuel A. Hirshowitz of counsel), in his statutory capacity under Section 71 of the Executive Law. Upon the record in this case the Nassau County Government Law (L. 1936, ch. 879 as amd.) § 104), should not have been held unconstitutional. Special Term failed to hold a hearing in accordance with this court's decision in *Iannucci v. Board of Supervisors of County of Washington*, 20 N Y 2d 244 (1967), to evaluate the "voting powers" of each of the members of the Board of Supervisors. The Appellate Division disregarded this failure and erroneously deemed it to be unnecessary to take the testimony required by the *Iannucci* decision. (*Avery v. Midland County*, 390 U. S. 474; *Sailors v. Board of Educ. of County of Kent*, 387 U. S. 105; *Kramer v. Union School Dist.*, 395 U. S. 621; *Dusch v. Davis*, 387 U. S. 112.)

GIBSON, J. The plaintiffs in this reapportionment case attack the present weighted voting plan under which the Board of Supervisors of Nassau County has long operated.¹ Upon motion, Special Term awarded summary judgment declaring the plan "illegal, invalid and inconsistent with the equal pro-

¹ Nassau County Govt. Law (L. 1936, ch. 879, as amd.), § 104.

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tection clauses of the State and Federal Constitutions" and directing that, within six months, the appropriate defendants "adopt local laws containing plans for apportionment of the Nassau County Board of Supervisors which are legal, valid and consistent with the equal protection clauses". The Appellate Division unanimously affirmed, finding "inescapable" its conclusion that the residents of the Town of Hempstead were unconstitutionally deprived of their right to substantial equality of representation.

Concededly, the Town of Hempstead's population constituted 57.12% of the county's population but that town's representatives may cast but 49.6% of the board's vote. Important as is the fact of the present inequality, it is of even greater moment that inequality in some degree is mandated and, indeed, perpetuated by the charter provision: "nor shall the supervisor or supervisors of any town or city be entitled to cast more than fifty per centum of the total vote of said board." (L. 1936, ch. 879, § 104, subd. 2.) This provision has survived two attempts at reapportionment, proposals therefor having been defeated in referendums conducted in 1965 and 1967²; and clearly violates the one man, one vote principle. The phenomenal population growth in Hempstead, as in Nassau County generally, points up the inequality created and perpetuated by the charter provision. Not only are the Hempstead Supervisors presently barred from exercise of a majority vote, but section 104 would continue to deprive them, or the residents of any other town or city subsequently containing a majority of the county population, from majority representation, regardless of how great their majority may presently be or may in future become. This is the vital factor which distinguishes the case from *Abate v. Mundt* (25 N Y 2d 309), recently decided.

Thus, it was proper to direct reapportionment but it seems unwise and unnecessary to proceed thereto on the basis of the 1960 census.

2. Reapportionment (subject, however, to the basic plan, and its infirmities) would be mandatory following the 1970 census, under the charter provision requiring that "[t]he assignment of votes among members of the board of supervisors shall be readjusted within sixty days after the public announcement of the enumeration of the inhabitants of the county in each federal and state census if there be one." (L. 1936, ch. 879, § 104, subd. 3.)

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The order appealed from should be modified so as to direct that a valid reapportionment plan be adopted by the Board of Supervisors within six months after public announcement of the enumeration of the inhabitants of Nassau County in the Federal census of 1970 and that meanwhile the present plan remain in effect as a temporary measure, and, as so modified, the order should be affirmed.

Chief Judge FULD and Judges BURKE, SCHLEPPI, BERGAN, BREITEL and JASEN concur.

Order modified in accordance with the opinion herein and, as so modified, affirmed, without costs.
